
In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION LTD., ET AL
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
MOSHER STEEL COMPANY,
Appellees.

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

FILED

DEC 1 1967

WM. B. LUCK, CLERK

LOCKE, PURNELL, BOREN,
LANEY & NEELY,
36th Floor Republic National
Bank Tower,
Dallas, Texas,
and

CUSICK, WATKINS & STEWART,
709 Valley National Building,
Tucson, Arizona 85701.

CHARLES G. PURNELL,
FRANK H. WATKINS,
Of Counsel.

SUBJECT INDEX

	Page
I Jurisdictional Statement	1
II Statement of the Case	2
III Argument	
The contractual Relationship between Mosher and Union being direct and Mosher having given Flour the written notice required by the Miller Act, a Judgment against Flour and its surities, under the Miller Act, is entirely proper	2
Conclusion	4
Certificate of Compliance	4

	Page
Miller Act, Title 40 U.S.C. Section 270 A and B	1, 2
28 U.S.C., Section 1291 and 2107	1
Federal Rules of Civil Procedure, Rule 73	1

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION LTD., ET AL
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
MOSHER STEEL COMPANY and
MOSHER STEEL COMPANY,
Appellees.

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

I

JURISDICTIONAL STATEMENT

Jurisdiction with respect to the Fluor Corporation and its sureties as listed above, exists by virtue of Section 270A and B, Title 40 U.S.C., commonly known as the Miller Act. Jurisdiction on appeal has been invoked pursuant to 28 U.S.C., Sections 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

In the interest of brevity Appellee Mosher Steel Company adopts and respectfully refers the court to the statements of the case contained in Appellee's briefs responding to Appellant Union and Appellant Ward.

The court having found that Mosher had a direct contractual relationship with Union and gave Fluor the written notice required by 40 U.S.C., Section 270B, a Judgment was rendered for Mosher against Appellant Fluor Corporation and its sureties for the work performed for the Davis-Monthan facility at Tucson, Arizona.

III

ARGUMENT

THE CONTRACTUAL RELATIONSHIP BETWEEN MOSHER AND UNION BEING DIRECT AND MOSHER HAVING GIVEN FLUOR THE WRITTEN NOTICE REQUIRED BY THE MILLER ACT, A JUDGMENT AGAINST FLUOR AND ITS SURETIES, UNDER THE MILLER ACT, IS ENTIRELY PROPER.

The Court is respectfully referred to the statement and argument contained in Appellee's brief in response to Appellant Union Tank Car Company for a statement of the testimony and evidence which amply supports the Trial Court's finding that Mosher had a direct contractual relationship with Union.

The position of Fluor and the sureties seems to be that, even if the contractual relationship between Union and Mosher is direct, it is not the type of relationship contemplated by the Miller Act.

Fluor and the sureties have found no case to support their contention, but merely say that Mosher's relationship was not covered by the Miller Act because its relationship with Union was not "as a material man, laborer, or sub-contractor." In arguing this point, Fluor and the sureties again, contrary to the Trial Court's findings, take the position that Union was merely a surety for IMI-Ward. Based upon the testimony and evidence, the trial court has found otherwise. It has found that the contractual relationship was direct, rather than collateral.

This being so, since Mosher was concededly a laborer and material man directly for Union under the Joint Venture purchase orders, and since Union was directly obligated to Mosher for the payment thereof, the contractual relationship between Mosher and Union was in fact "as a material man, laborer, or sub-contractor".

As pointed out in Appellee's briefs responding to the Union and the Ward contentions, the mere fact that Mosher was also bound, and performed labor and supplied material, under a direct contractual relationship with IMI-Ward, does not render the Mosher contractual relationship with Union any the less direct.

The final statement made by Fluor that "there is no conceivable way in which Fluor could protect itself in the fact situation presented by this case" is, of course, poppycock. The Miller Act letter sent by Mosher to Fluor, in which Mosher alleged a direct contractual relationship with Union, was sent to Fluor by Registered Mail on March 20, 1962 (PL 24) long before the Union work on the Davis-Monthan project was completed. In fact, the record shows that in

December, 1962, when Mr. Middleton left Union, there were claims on account of change orders in the amount of \$2,500,000.00 and that other claims for impact and acceleration for additional sums were processed after December, 1962. (RT 596, 597, 598).

CONCLUSION

Appellees respectfully submit that the Judgment against Fluor and the sureties is correct and should be affirmed.

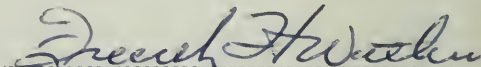
Respectfully submitted,

LOCKE, PURNELL, BOREN,
LANEY & NEELY,
CUSICK, WATKINS & STEWART,
Attorneys for Appellee.

CHARLES G. PURNELL,
FRANK H. WATKINS,
Of Counsel.

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Frank H. Watkins, *Attorney*

